APPEAL NO. 010558

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 16, 2001. On the sole issue, the hearing officer determined that the respondent (claimant) had good cause for his failure to attend the appellant's (carrier) required medical examination (RME).

DECISION

Affirmed.

The hearing officer did not err in determining that the claimant had good cause for failing to attend the RME on October 11, 2000. This case involves the application of Section 408.004(e), which provides that a carrier may suspend temporary income benefits, during and for a period in which the employee fails to submit to an RME unless the Texas Workers' Compensation Commission (Commission) determines that the employee had good cause for the failure to submit to the examination. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994.

The claimant testified that he did not attend the RME because he did not receive notice of it prior to the scheduled appointment. The carrier points to evidence that the claimant's representative received notice of the RME, in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(b) (Rule 126.6(b)), and argues that good cause cannot be found to exist in view of such evidence. The carrier implicitly asserts that notice to the claimant's representative is imputed to the claimant himself. We observe that Rule 126.6(b), which implements Section 408.004, requires the carrier to provide notice to the employee *and* the employee's representative of a scheduled RME. In view of the evidence presented, we cannot conclude that the hearing officer abused her discretion in determining that the claimant had good cause for failing to submit to the RME on October 11, 2000.

We note that the hearing officer, in reaching her determination, found that the carrier's notice was deemed to have been sent to the claimant on September 29, 2000, pursuant to Rule 102.4, but that said notice was not received by the claimant prior to the date of the appointment. We disagree that Rule 102.4 operates to deem that the carrier's notice was sent on September 29, 2000, in the absence of proof that the carrier's notice was ever mailed to, or received by, the claimant. Rule 102.4 (h) provides, in pertinent part,

that unless the great weight of the evidence indicates otherwise, written communications shall be deemed to have been sent on the date postmarked if sent by mail, or, if the postmark date is unavailable, the later of the signature date on the written communication or the date it was received minus five days. The rule was intended to provide criteria for the sent date for written communications between participants other than the Commission, to help resolve disputes regarding whether a person timely made a required communication. *See* Preamble 24 Tex. Reg. 6488, 6490 (1999). Rule 102.4(h) does not obviate the need to establish that notice was in fact sent to or received by a party. Because the hearing officer's application of the rule to this case did not alter her determination that the claimant had good cause for failing to submit to the RME, our discussion here does not affect our decision above.

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Thomas A. Knapp
Appeals Judge